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No. 03-1068

Supreme Court, U.S.
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In the
Supreme Court of the United States

NIPPON KAIJI KYOKAI CORPORATION,
Petitioner,

v.

OTTO CANDIES, L.L.C.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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REPLY BRIEF

To a limited extent, respondent's characterization of this case as "quite ordinary," Brief in Opposition ("Br. Op.") at 1, is correct. The case concerns a commonplace transaction — the sale of a vessel under a standard form Memorandum of Agreement ("MOA"). As is typically true, the vessel in question had received a classification certificate from a respected classification society (in this case, petitioner). It is not unusual that a dispute arose about the condition of the vessel on delivery. And unfortunately it is all too common for the disgruntled buyer (in this case, respondent) to seek a financial recovery from the most convenient defendant, with little or no regard for identifying the party that was truly responsible for the loss.

What sets this case apart from the ordinary vessel purchase dispute, and what cries out for this Court's review, is the Fifth Circuit's analysis of the legal issues involved. MOAs in this context typically contain provisions concerning the classification of the vessel but (a) the classification society is not a party to the MOA, (b) the fact that the vessel may have been in class (meaning that it was compliant with the technicalities of the rules and regulations of the classification society) is not a guarantee of condition, seaworthiness, fitness for a specific purpose, or compliance with the requirements of a sale contract, and (c) the relevant obligations under the MOA are imposed on the seller of the vessel, not on the classification society. That is why, incidentally, a buyer normally pursues any claim arising under an MOA against the seller.

The court below, in conflict with the consistent understanding of admiralty courts in this country and abroad, completely misunderstood the context of the case and charged

petitioner with a role that classification societies simply do not assume. Indeed, respondent's summary of the Fifth Circuit's analysis concedes the confusion of the lower courts. For example, respondent admits that the decision below rests on the conclusion that "NKK ... supplied false information for [respondent's] guidance in a business transaction." Br. Op. 1. Similarly, respondent also admits that the decision below rests on the conclusion that it "justifiably relied" on the information that petitioner supplied. Br. Op. 2. As explained in the petition, these conclusions are both wrong and out of step with the reasoning in all other courts. Classification societies never "suppl[y] false [or any other] information for [a third party's] guidance in a business transaction." A classification certificate is supplied for the vessel owner's guidance. And a third party cannot be justified in relying on the information prepared for another's benefit.

The court below misunderstood the limited role of a classification society, failing to see the distinction that exists between classification and seaworthiness, and the primacy of the owner's obligations with regard to seaworthiness. In basing its decision on the findings that petitioner had "supplied false information for [respondent's] guidance in a business transaction" and that NKK's survey of the vessel was intended to benefit respondent, the Fifth Circuit has fundamentally misunderstood how classification societies operate. It is this in particular that puts the decision below out of line with the decisions of U.S. and other courts around the world.

Put simply, NKK issued the classification certificate - as any classification society does - to and for the benefit of its client (the owner) in accordance with the terms of the contract which exists between the owner and NKK and that certificate confirmed that the vessel complied with the relevant

classification rules and regulations and was in class (NKK Coastal Class). That is the end of Class NK's obligations. The classification certificate was issued (i) to the owner, (ii) to confirm compliance (only) with the classification rules and regulations, and (iii) pursuant to contract that included detailed terms and conditions. It was not, would not have been, or would not have been intended to be, issued to respondent. The rules and regulations do not allow NKK to disclose confidential classification material to a third party, NKK has no contractual or other relationship with the buyer of a vessel and the survey was performed for classification/owner's (seller's) purposes only. It was not, for example, a pre-purchase condition survey (which classification societies do not perform as part of their classification services and which a prudent buyer usually arranges elsewhere).

Respondent seeks to dismiss the petition with unjustified pejorative labels and unfounded and insulting suggestions questioning petitioner's honesty and professionalism. But as the authorities cited in the petition - including the highest court in Britain - make clear, a number of serious policy issues arise in cases involving classification societies precisely because of their particular role in the maritime industry. It is proper therefore that due account should be taken of these.

Petitioner has not exaggerated the consequences that may follow from the decision below. If it stands, any buyer of a vessel will feel able to sue that vessel's classification society, instead of or in addition to the owner, in respect of breaches of the sale contract for which the owner is acknowledged to be responsible in maritime law and the international trade system. That is one of the main reasons why the decision has attracted so much comment in the industry publications. Nobody is arguing that classification societies should have

special immunity. They should not, however, be held to have a liability (a) to parties to whom they have assumed no legal responsibility and (b) in respect of an engagement that they do not perform. If the Fifth Circuit's decision is used as a precedent to expose classification societies to liability in an MOA situation, then it is not an exaggeration to say that their rules and regulations will need to be rewritten, their practices and procedures will have to be fundamentally changed and they will be compelled to charge significantly higher fees to shipowners to cover the risks of this greater liability which the decision creates. Their role also as promoters of the collective welfare and the safety of lives and ships will necessarily be diminished for the reasons set out in the Petition.

CONCLUSION

While the unique fact situation addressing the requirements of a classification society to abide by its own rules - not the rules of any other classification society, no representations were made to CANDIES with respect to seaworthiness or condition of the vessel, but were only in respect to the vessel's classification status.

Petitioner moves that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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